No. 77-1120

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANDREW TSANAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in its instructions to the jury with respect to a lesser included offense.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of filing a false tax return for 1972, in violation of 26 U.S.C. 7206(1), and three counts of tax evasion for 1973, 1974 and 1975, in violation of 26 U.S.C. 7201 (Pet. App. 1078).[1] The trial court imposed concurrent three-year terms of imprisonment and a $15,000 fine on Counts II and III (relating to 1972 and

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[1]Petitioner was acquitted on Count I, charging attempted tax evasion for 1971.

1973), to be followed by three years' probation on Counts IV and V (relating to 1974 and 1975) (Pet. App. 1078-1079). The court of appeals affirmed (Pet. App. 1077-1091).

The indictment charged petitioner and his wife with attempting to evade their personal income taxes for the years 1971-1975 by the filing of false tax returns, in violation of 26 U.S.C. 7201 (Pet. App. 1078).[2] The trial judge instructed the jury that the offense of filing a false tax return (26 U.S.C. 7206(1)) was an offense included within the charged offense of attempted tax evasion (26 U.S.C. 7201) and then stated (Pet. App. 1082-1083):

> The law permits the jury to find the accused guilty of any lesser offense which is necessarily included in the crime charged in the indictment whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law given and the instructions of the Court. If the jury should unanimously find the accused not guilty of the crime charged in the indictment, then the jury must proceed to determine the guilt or innocence of the accused as to the lesser offense which is necessarily included in the crime charged.

Petitioner requested that the jury be advised that it could consider the lesser included offense, and he did not object to the above-quoted instruction (Pet. App. 1083, 1088). Nevertheless, he argued in the court of appeals that the trial court committed plain error in requiring a unanimous not guilty finding on the greater offense before allowing the jury to consider the lesser included

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[2]Shortly after the trial commenced, petitioner's wife pleaded guilty to one count of filing a false tax return, in violation of 26 U.S.C. 7206(1) (Pet. App. 1078).

offense. In petitioner's view, the jury should have been told that it could consider the lesser offense if it could not reach agreement on a conviction for the greater offense (Pet. App. 1083).

The court of appeals concluded that neither form of instruction was wrong as a matter of law and, hence, there was no plain error; that the trial court may give the instruction it prefers if the defendant expresses no choice; and that the trial court did not err, because petitioner did not request at trial the form of instruction he advocated on appeal (Pet. App. 1088-1089).

Petitioner now argues (Pet. 4-7) that the court of appeals created a new rule when it held that either form of lesser included offense instruction was correct and that a trial court should give the form of instruction requested by the defendant. From this premise, petitioner concludes that the court of appeals should have given him the benefit of the new rule by remanding the case for a new trial.

Contrary to petitioner's assertion, the decision of the court of appeals did not create a new rule of law. The court simply recognized (Pet. App. 1083-1084) that there was authority supporting both forms of instruction and concluded that the defendant should be given the instruction he requests. Thus, had petitioner requested the form of instruction that facilitates a lesser offense conviction rather than a hung jury, he would have been entitled to the form of instruction he sought. But he requested no instruction and should not now be heard to complain that the instruction he never requested nevertheless should have been given. See Rule 30, Fed. R. Crim. P.. Indeed, as the court of appeals observed (Pet. App. 1087-1088), there is nothing inherently preferable to a defendant in one form of the instruction rather than the

other. One defendant might prefer an instruction requiring a unanimous verdict on the greater offense because he prefers a hung jury to a conviction on the lesser offense. Another defendant—or, indeed, the prosecutor—might prefer a verdict on the lesser offense, thereby minimizing the risk that a second trial will be necessary. As a result, the defendant must express at trial a preference for one of the two types of instructions, and in view of his failure to do so here, there is no reversible error.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

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[3]The cases petitioner cites (Pet. 6-7) in support of his claim that the court of appeals should have given him the benefit of its ruling on appeal do not support his position. They involve situations where the claim was raised in the trial court (*Burgett* v. *Texas*, 389 U.S. 109; *Eskridge* v. *Washington Prison Board*, 357 U.S. 214); where the court of appeals did not discuss the waiver issue (*United States* v. *Ford*, 550 F. 2d 732 (C.A. 2), certiorari granted, October 3, 1977 (No. 77-52)); where pertinent facts were not known to the defendant at the time of trial (*United States* v. *Cyphers*, 556 F. 2d 630 (C.A. 2), certiorari denied, 431 U.S. 972); and where the error involved brought into question the very integrity of the fact-finding process (*Berger* v. *California*, 393 U.S. 314; *Arsenault* v. *Massachusetts*, 393 U.S. 5; *Roberts* v. *Russell*, 392 U.S. 293; *Witherspoon* v. *Illinois*, 391 U.S. 510; *Pickelsimer* v. *Wainwright*, 375 U.S. 2).

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